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# POWERS OF APPOINTMENT IN CALIFORNIA

By RICHARD R. B. POWELL\*

## Introduction

**P**OWERS of appointment were used with great frequency in England during the 17th and 18th centuries.<sup>1</sup> Chief Justice Lord Mansfield died in 1793. In his will he thus explained why he had employed powers of appointment in his dispositions:

Those who are nearest and dearest to me best know how to manage and improve, and ultimately in their turn, to divide and subdivide, the good things of this world which I commit to their care, *according to events and contingencies which it is impossible for me to foresee, or trace through all the many labyrinths of time and chance.*<sup>2</sup>

The flexibility of dispositions, and their moulding in the light of circumstances, which occur decades after the disposer has died, is still the most powerful argument for a free use of powers of appointment.<sup>3</sup>

West of the Atlantic there was a great hiatus of time between the English resort to powers, and the kindling interest in powers recently to be observed. This is easily understood. In the early decades of a new economy substantial accumulations of wealth are slow to grow. It is also true that American conveyancers lacked both the finesse and the technical training common among their English brethren. In consequence the decisions of American courts concerning powers of appointment were extremely few in number down to 1900.<sup>4</sup>

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This article was prepared to provide the California Law Revision Commission with background information for its study of this subject. The opinions, conclusions, and recommendations contained in the article are entirely those of the author and do not necessarily represent or reflect the opinions, conclusions, or recommendations of the California Law Revision Commission.

<sup>1</sup> E. SUGDEN, A PRACTICAL TREATISE OF POWERS (7th ed. 1845), originally published in 1823, contains 1234 pages of exposition as to their creation and characteristics.

<sup>2</sup> Quoted in *Per Stirpes vs. Powers of Appointment*, in THE BANK OF CALIFORNIA, ESTATE PLANNING STUDIES 1 (Fall 1966).

<sup>3</sup> The Bank of California, in the Fall of 1966, devoted an eight-page bulletin (cited in note 2 *supra*) to the "enormous possibilities of the power." The Chemical Bank New York Trust Co. devoted the whole of their monthly bulletin, TAXES AND ESTATES, for January 1968, to *Flexibility Through Powers of Appointment*.

<sup>4</sup> *Morffew v. San Francisco & S.R.R.R.*, 107 Cal. 587, 40 P. 810 (1895), contains the only judicial reference to powers of appointment which this writer has been able to find in California reports down to 1900.

So long as Californians with large accumulations of wealth were rare, and so long as gift and death taxes were absent, or low in percentage, a failure to use powers of appointment was of little practical importance. Both of these facts have been changing rapidly in recent decades. This state now counts among its citizens a very large number of wealthy individuals; and both gift and death taxes, both state and federal, have long since ceased to be "low in percentage." Future dispositions of large fortunes require full awareness of any available device which gives added flexibility and of any available device which can minimize the tax-bite. Powers of appointment serve both of these ends.<sup>5</sup> Lawyers whose work includes the drafting of wills or trusts have a responsibility to their clients to assure that the dispositions made will have the maximum in flexibility and the minimum of tax-loss, consistent with the desires of the client and with safety.

California lawyers have been most hesitant in using powers of appointment. This attitude was wholly understandable, and wholly justified, while it remained uncertain whether the law of California permitted powers of appointment. That uncertainty was eliminated by 1935.<sup>6</sup> The hesitance has, however, continued with only a slight abatement, from 1935 down to date. This presents the problem to which this study is devoted.

It is, perhaps, useful to begin with an exposition of the positions heretofore taken by the courts of California as to the law governing powers of appointment;<sup>7</sup> to continue with an exposition of the statutory ingredient in the California law as to powers of appointment;<sup>8</sup> to present the reasons urging the enactment of a statute, fairly inclusive in scope, setting forth the "California common law" on powers of appointment;<sup>9</sup> to follow these three general presentations, with a detailed consideration of the specific rules which will work best with respect to the rights of creditors of the donee of a general power,<sup>10</sup>

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<sup>5</sup> The tax-saving factor works thus: suppose that A has \$500,000 of assets at his death; that A wills these assets to B as trustee to pay the income to A's widow C for life; thereafter to pay the income in equal shares to A's children, D, E and F, for their several lives; then, on the death of each child, to distribute the corpus of each child's share to such relatives of the life tenant child by blood or marriage as the life tenant child shall appoint by will. There is no escaping the federal estate tax or the California inheritance tax which becomes payable on A's death; *but* the nongeneral character of the power of appointment conferred on D, E and F *excludes* the appointive assets, from their respective estates. *One generation is thus skipped* for federal tax purposes; and like results can be obtained under the California inheritance tax as to all powers of appointment created since 1935.

<sup>6</sup> See text accompanying notes 14-27 *infra*.

<sup>7</sup> See text accompanying notes 15-56 *infra*.

<sup>8</sup> See text accompanying notes 58-75 *infra*.

<sup>9</sup> See text accompanying notes 76-81 *infra*.

<sup>10</sup> See text accompanying notes 82-90 *infra*.

and in favoring exclusive or nonexclusive powers.<sup>11</sup> These last two points deal with matters in which wisdom may well dictate a modernization of the ancient common law. Lastly it is vital to present a tentative form of statute which is designed to accomplish the desired ends.<sup>12</sup> Those concerned with the clarity and serviceability of our current law can then make such suggestions as are dictated by their experiences, to the end that the statute finally presented to the legislature for enactment can be the best that can be evolved to meet the current needs of this great state.

### Positions Heretofore Taken by the Courts of California, as to Powers of Appointment

The early statute of 1850, adopting, in general, the common law was incorporated into the Political Code as section 4468,<sup>13</sup> and is now present, with no change of substance in California Civil Code section 22.2.<sup>14</sup> This statute has been claimed to establish in California the common law as to powers of appointment for the period of 1850-1872. If it did, the law so established was a "paper law," because there are no decisions or other records which indicate that anyone sought to create a power of appointment in California prior to 1872. It is, nevertheless, indisputable that the statute of 1850 furnished the commonly accepted background for the controversy as to the consequences of California legislation in 1872 and 1874.

The pervasive influence of the New York Field Code on the California statutes of 1872 needs no discussion at this time. As a part of that influence, California adopted a statute containing 62 sections concerning powers of appointment,<sup>15</sup> modeled on the New York Revised Statutes of 1830. The complexity of these provisions, plus a complete lack of any awareness of the possibilities of powers, caused California to do in 2 years what New York required 135 years to accomplish. In 1874, as a part of its "cleanup of the 'excesses of

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<sup>11</sup> See text accompanying notes 91-96 *infra*.

<sup>12</sup> See Appendix A.

<sup>13</sup> Cal. Stats. 1850, ch. 95, at 219.

<sup>14</sup> CAL. CIV. CODE § 22.2 states:

"The common law of England, so far as it is not repugnant [to] or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State."

This section was added by Cal. Stats. 1951, ch. 655, § 1, at 1833, and was derived from Cal. Pol. Code § 4468, Cal. Stats. 1850, ch. 95, at 219 (repealed 1951).

To any having historical interests, see 1 Cal. 588-604 (1850), which contains the *Report of the Senate Judiciary Comm.*, dated February 27, 1850, narrating the struggle in the legal profession as to whether California should have the "common law" or the "civil law." This report resulted in Cal. Pol. Code § 4468, Cal. Stats. 1850, ch. 95, at 219 (repealed 1951).

<sup>15</sup> Cal. Civ. Code of 1872, §§ 878-940 (repealed 1874).

1872," the California Legislature repealed the entire group of 62 sections.<sup>16</sup>

This 1874 repeal of the statute of 1872 raised a very basic question. Did the adoption of the New York statutory system of powers, in 1872, followed by the complete repeal of these provisions in 1874, leave California with its prior common law as to powers, or leave California with no law whatever permitting and regulating powers of appointment?

*Estate of Fair*,<sup>17</sup> in 1901, by a 4-to-3 decision took the position that the 1874 repeal left California with none of its common law on powers. During the next 34 years California courts manifested great hesitance in accepting the common law on this topic. In *Estate of Dunphy*<sup>18</sup> the supreme court sidestepped the basic question in 1905. By finding that remainders created in named persons were vested, and that the claimed powers to appoint had never been exercised, the case was decided without any decision on the lawfulness in California of powers. There was, however, a dictum that powers of appointment were permissible; and this dictum was in the opinion written by Justice McFarland who had been one of the four judges finding powers in trust nonexistent in *Estate of Fair*,<sup>19</sup> 4 years before. In *Gray v. Union Trust Co.*,<sup>20</sup> the desired termination of a trust was refused in 1915 by finding the created remainders vested, whether the attempted divesting power of appointment was good or bad. Again there was a dictum,<sup>21</sup> that a reserved power of appointment was "probably valid." In *Estate of Murphy*<sup>22</sup> the supreme court, in 1920, happily announced that the same result would flow from *either* finding no valid power of appointment to have been created, or finding an effective exercise of a validly created power. Thus again the basic question was left unanswered. In *Estate of McCurdy*,<sup>23</sup> in 1925, the death of the named donee before the death of the testator-donor relieved the supreme court from the necessity of passing on the permissibility, in California, of powers of appointment. The court said:

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<sup>16</sup> Cal. Stats. 1873-1874, ch. 612, § 123, at 223. This statute was approved April 30, 1874, and became effective July 1, 1874.

A similar result in New York was reached by ch. 864, §§ 1-2, [1964] N.Y. Laws 2322, effective June 1, 1965 (drawn by the writer of this article).

<sup>17</sup> 132 Cal. 523, 537, 64 P. 1000 (1901). The dissent by Temple, J., concurred in by Harrison, J., and Beatty, C.J., later became accepted California law. See text accompanying notes 28-29 *infra*.

<sup>18</sup> 147 Cal. 95, 81 P. 315 (1905).

<sup>19</sup> See note 17 *supra*.

<sup>20</sup> 171 Cal. 637, 154 P. 306 (1915).

<sup>21</sup> *Id.* at 642, 154 P. at 309: "There is in this trust a power of appointment or nomination reserved to the trustor." This statement was in no way necessary to the decision.

<sup>22</sup> 182 Cal. 740, 190 P. 46 (1920).

<sup>23</sup> 197 Cal. 276, 240 P. 498 (1925).

We are not concerned with the question whether or not powers of appointment are valid in this state, since the repeal by the legislature in 1874 of the title in the Civil Code relating to powers . . . .<sup>24</sup>

As long as the supreme court of the state avoided an outright overruling of the 4-to-3 decision in *Estate of Fair*,<sup>25</sup> informed lawyers were wise not to subject their clients to possible litigation by inserting powers of appointment in dispositive instruments. This continued to be the discouraging situation until 1935.<sup>26</sup>

*Estate of Sloan*,<sup>27</sup> in 1935, adopted the position argued by the three dissenters in *Estate of Fair*,<sup>28</sup> decided that the 1874 statute did not abrogate "the common law of powers"; and declared:

*the whole question is solved whenever it is determined what the common law rule is.*<sup>29</sup>

Unfortunately, the acceptance, for California, of the "common law" as to powers, did not settle all of the problems facing lawyers in this field. *What is the common law on powers of appointment?* Some learned in the history of the law remember the preface to the Proposed Civil Code (at iii), written by the Commissioners on October 2, 1871. This preface reads:

Our Act adopting the Common Law of England (Stats. 1850, 219) is as follows: "The Common Law of England, so far as it is not repugnant to, or inconsistent with, the Constitution of the United States, or the Constitution or laws of the State of California, shall be the rule of decision in all the Courts of this State." The Courts hold that this Act does not mean Common Law of England, but of the United States—"American Common Law;" the Common Law of England, as *modified* by the respective States. There are as many authoritative modifications as there are States in the Union. Rules upon the same subject differ much in different States. When they so differ, or when they need modifications to suit our conditions, the Court, not the Legislature, establishes the law.

The potential babel of the 50, possibly discordant, voices has caused the lawyers of California to continue hesitant in using powers of appointment. This same problem, i.e. what is the common law on powers of appointment, engaged the efforts of those of us working on the

<sup>24</sup> *Id.* at 286, 240 P. at 502.

<sup>25</sup> See note 17 *supra*.

<sup>26</sup> A careful search has revealed only one opinion prior to 1935, basing its result on the effective exercise of a general testamentary power. This is the lower appellate court opinion of *Reed v. Hollister*, 44 Cal. App. 533, 186 P. 819 (1919).

<sup>27</sup> 7 Cal. App. 2d 319, 46 P.2d 1007 (1935).

<sup>28</sup> See note 17 *supra*.

<sup>29</sup> 7 Cal. App. 2d at 332, 46 P.2d at 1013 (emphasis added). This statement is, of course, subject to the qualification that the common law of powers prevails in California, *except as it has been modified by statute*. As to these statutory modifications, see text accompanying notes 61-75 *infra*.

Reiterating the controlling force of the common law on powers in California (since 1935), see *Estate of Elston*, 32 Cal. App. 2d 652, 90 P.2d 608 (1939); *Estate of Huntington*, 10 Misc. 2d 932, 170 N.Y.S.2d 452 (Sur. Ct. 1957) (New York case resting its decision on California law).

*Restatement of Property*, during the 5 years between 1935 and 1940. Professor W. Barton Leach of Harvard became the Special Reporter for the topic Powers of Appointment. With the advice and counsel of the judges, practitioners and law professors<sup>30</sup> of the country, a chapter 25 of the *Restatement of Property* containing 51 sections, and occupying 237 printed pages, was published in 1940. Herein, for the first time in American jurisprudence, could be found the harmonizing of discordant voices in the nonstatutory law of powers, with a considered choice as between conflicting rules. It never was intended to be accepted in toto, and without inquiry, as the law of California or of any other state. It merely provides the embodiment of 1940 wisdom of a group of specialists, which the courts of any state are free to follow or to modify. It does, however, indicate the diversities of the commonly litigated problems raised when powers of appointment are commonly employed.

A careful combing of the California reports reveals not only the seven cases above discussed, which culminated in the acceptance of the common law of powers as the California law,<sup>31</sup> but some 13 other cases<sup>32</sup> dealing with specific problems in the law of powers, and an additional group of cases furnishing analogies possibly applicable to powers.<sup>33</sup> The 13 specific holdings cover (a) the validity of a discretionary power to fix the shares of five takers;<sup>34</sup> (b) the validity of a special power presently exercisable, and the taxability under the California inheritance law of the appointive assets separately from an outright gift made to the donee;<sup>35</sup> (c) the sufficiency of circumstantial evidence to prove the exercise of a general testamentary power as to bank stock, plus the more important holding that an inter vivos agreement made by the donee cannot be effective to exercise a testamentary power;<sup>36</sup> (d) the ease of creating a power by combining the inferences based on separate facts;<sup>37</sup> (e) the lawfulness of the exercise of a general testamentary power created inter vivos in 1930, by

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<sup>30</sup> Dean Orrin K. McMurray of Berkeley was then a member of the Institute's Council. The group doing the research, and working on its accurate expression, included two persons, then and now distinguished Professors of Property Law at Harvard, namely A. James Casner and W. Barton Leach, plus four who are presently on the Faculty of Hastings College of the Law, namely, Everett Fraser (emeritus), J. Warren Madden, Richard R. Powell and Lewis M. Simes.

<sup>31</sup> See text accompanying notes 18, 19, 21, 23, 24, 27, 28 *supra*.

<sup>32</sup> See text accompanying notes 34-46 *infra*.

<sup>33</sup> See text accompanying notes 50-57 *infra*.

<sup>34</sup> Estate of Davis, 13 Cal. App. 2d 64, 56 P.2d 584 (1936).

<sup>35</sup> Estate of Elston, 32 Cal. App. 2d 652, 90 P.2d 608 (1939).

<sup>36</sup> Childs v. Cross, 41 Cal. App. 2d 680, 107 P.2d 424 (1940). This case applies the rule embodied in RESTATEMENT OF PROPERTY § 340 (1940) [hereinafter cited as RESTATEMENT].

<sup>37</sup> Security-First Nat'l Bank v. Ogilvie, 47 Cal. App. 2d 787, 119 P.2d 25 (1941). This is the rule embodied in RESTATEMENT § 323.

a will executed in 1929;<sup>38</sup> (f) the inclusion of the appointive assets in the gross estate of a donee of a general power presently exercisable, for the purposes of the federal estate tax when the power was exercised in 1932;<sup>39</sup> (g) the existence of "fraud on the power" which caused the exercise to fail when the donee of a special power attempted to divert some of the appointive assets to a person outside the permissible group of appointees;<sup>40</sup> (h) the ability of a donee-testator to prevent the proration of the federal estate tax, under the exception embodied in California Probate Code section 970;<sup>41</sup> (i) the taking of the appointive assets by the takers in default named by the donor of the power to whatever extent the donee fails effectively to exercise his power;<sup>42</sup> (j) the nonexercisability of a testamentary power by an *inter vivos act*;<sup>43</sup> (k) the fact that an equitable life interest under a trust plus a special testamentary power to appoint is not the equivalent of ownership;<sup>44</sup> (l) the ease of creating a power by combining the inferences based on separate facts;<sup>45</sup> (m) the determination of the validity, under the Rule Against Perpetuities, of the exercise of a general *testamentary* power by applying the permissible period from the *creation* of the power, but taking into account the circumstances which exist when the power is exercised.<sup>46</sup>

In assessing the 20 California decisions thus far discussed, three conclusions are justified. In the first place, the California cases thus far decided cover only a very small fraction of the problems dealt with by the common law as exemplified in the 237 printed pages of chapter 25 of the *Restatement of Property*. In the second place, on

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<sup>38</sup> California Trust Co. v. Ott, 59 Cal. App. 2d 715, 140 P.2d 79 (1943). This is the rule embodied in RESTATEMENT § 344.

<sup>39</sup> Henderson v. Rogan, 159 F.2d 855 (9th Cir. 1947). This result would presently occur under the current provisions of INT. REV. CODE OF 1954, § 2041(a).

<sup>40</sup> Horne v. Title Ins. & Trust Co., 79 F. Supp. 91 (S.D. Cal. 1948). This is the rule embodied in RESTATEMENT § 353.

<sup>41</sup> Estate of Parker, 98 Cal. App. 2d 393, 220 P.2d 580 (1950).

<sup>42</sup> Estate of Baird, 120 Cal. App. 2d 219, 260 P.2d 1052 (1953); 135 Cal. App. 2d 333, 287 P.2d 365 (1955).

This is a small part of the rule embodied in RESTATEMENT § 365. It has the practical merit of decreasing the costs of settling the donee's estate.

<sup>43</sup> Briggs v. Briggs, 122 Cal. App. 2d 766, 265 P.2d 587 (1954). This is the rule embodied in RESTATEMENT § 346(a).

<sup>44</sup> Estate of Smythe, 132 Cal. App. 2d 343, 282 P.2d 141 (1955).

<sup>45</sup> Estate of Kuttler, 160 Cal. App. 2d 332, 325 P.2d 624 (1958). This is the rule embodied in RESTATEMENT § 323.

<sup>46</sup> Estate of Bird, 225 Cal. App. 2d 196, 37 Cal. Rptr. 288 (1964). This is the rule embodied in RESTATEMENT § 392. It represents the growth of the common law which began with Minot v. Paine, 230 Mass. 214, 120 N.E. 167 (1918), and has since been accepted as sound common law in the Fourth Circuit and in Delaware, Georgia, Kentucky, Massachusetts, Missouri, New Jersey and Pennsylvania. The authorities are collected in 5 R. POWELL, REAL PROPERTY, ¶ 788 (1962) [hereinafter cited as POWELL].



the points decided there is almost complete<sup>47</sup> concurrence of the common law of California, as expounded by its courts, and of the common law of the United States, as set forth in the *Restatement of Property*. In the third place, *Estate of Sloan*,<sup>48</sup> which, in 1935, rendered California the great service of establishing for this state the common law on powers of appointment, also rendered this state a great disservice in adopting the then already obsolete rule of the old common law, namely a constructional preference for nonexclusive powers.<sup>49</sup> Herein, lies the danger of California's present position. On any litigation concerning powers, lawyers and judges have to retrace the long and arduous paths of research followed in the preparation of the *Restatement of Property*. This takes time of lawyers, and that means it requires large expenditures of clients' funds. It also takes much time of our judges. All this could be at least minimized by the enactment of a statute declaring the "California common law of powers."

The possibly useful analogies based on California cases *not* involving powers of appointment establish (a) equity's willingness to correct a defective exercise of a trustee's power to mortgage;<sup>50</sup> or (b) of a power of attorney;<sup>51</sup> (c) the nondelegability of a discretionary power to sell;<sup>52</sup> a judicial astuteness in making constructions which effect a giver's purposes;<sup>53</sup> (d) the ending of a power to convey conferred on two persons, when one of the two has died;<sup>54</sup> (e) a suggestion that an attempted exercise of a power of appointment in favor of the takers in default is a nullity;<sup>55</sup> (f) the inability to have a power to amend the terms of a trust exercised after the person having such power becomes incompetent;<sup>56</sup> and (g) the inability of one trustee to exercise a power which was conferred on this one plus another.<sup>57</sup>

<sup>47</sup> See text accompanying note 49 *infra* for the one area of divergence.

<sup>48</sup> 7 Cal. App. 2d 319, 47 P.2d 1007. This case is discussed in the text accompanying note 27 *supra*.

<sup>49</sup> In this case a special testamentary power to appoint to the donee's heirs was held invalidly exercised because the donee appointed to one maternal aunt, who along with two paternal aunts were heirs of the donee at his death. The constructional preference for nonexclusive powers had been declared by English cases of 1853 and 1854, and by early decisions of Minnesota, New Jersey, Virginia and West Virginia, and had been embalmed in *Ruling Case Law* and *Corpus Juris*. The constructional preference for allowing the donee full discretion to give, as he chooses, to one or more of the permissible appointees (now embodied in RESTATEMENT § 360 and based on numerous recent cases collected in 3 POWELL ¶ 398 nn.44-47) was, unfortunately, rejected.

<sup>50</sup> Beatty v. Clark, 20 Cal. 11 (1862).

<sup>51</sup> Gerdes v. Moody, 41 Cal. 335 (1871).

<sup>52</sup> Saunders v. Webber, 39 Cal. 287 (1870).

<sup>53</sup> Elmer v. Gray, 73 Cal. 283, 14 P. 862 (1887).

<sup>54</sup> Burnett v. Piercy, 149 Cal. 178, 86 P. 603 (1906).

<sup>55</sup> Estate of Murphy, 182 Cal. 740, 190 P. 46 (1920).

<sup>56</sup> Swart v. Security-First Nat'l Bank, 48 Cal. App. 2d 824, 120 P.2d 697 (1942).

<sup>57</sup> Briggs v. Briggs, 122 Cal. App. 2d 766, 265 P.2d 587 (1954).

## Statutory Ingredient in the Law of California on Powers of Appointment

Any general acceptance of the "common law" on a topic, is subject to an exception covering the statutory deviations therefrom.

The statutory ingredients in the California law on powers concern (a) the releasability of powers;<sup>58</sup> (b) the exercise of a power by a general disposition in the donee-decedent's will;<sup>59</sup> and (c) the taxation of the appointive assets under both the federal estate tax<sup>60</sup> and the California inheritance tax.<sup>61</sup>

The provisions of California Civil Code section 1060, making powers of appointment broadly releasable, were the fortunate product of a nationwide situation. The Internal Revenue Act of 1942<sup>62</sup> had changed the federal rule as to the taxing of appointive assets in the gross estate of the donee. If the permissible appointees were restricted to categories of persons listed in the statute, the appointive assets were excluded. Many persons in the country had powers of appointment not sufficiently restricted to gain the benefit of the 1942 legislation. There was a prevalent desire to curtail the broadness of their powers so as to save taxes. The American law as to the releasability of powers, especially as to a partial release which would diminish the categories of permissible appointees, was in a high state of uncertainty. In the year 1943, and shortly thereafter, a large number of American states met this problem by enacting a statute on releasability. California Civil Code section 1060 was enacted<sup>63</sup> as a

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<sup>58</sup> See text accompanying notes 61-63 *infra*.

<sup>59</sup> See text accompanying notes 65-70 *infra*.

<sup>60</sup> State legislation cannot change the federal tax statutes.

<sup>61</sup> See text accompanying notes 71-75 *infra*.

<sup>62</sup> Ch. 619, § 403, 56 Stat. 942-44.

<sup>63</sup> Cal. Stats. 1945, ch. 318, § 1, at 777. The text of CAL. CIV. CODE § 1060 is as follows:

"1. Any power, which is exercisable by deed, by will, by deed or will, or otherwise, whether general or special, other than a power in trust which is imperative, is releasable, either with or without consideration, by written instrument signed by the donee and delivered as hereinafter provided unless the instrument creating the power provides otherwise.

"2. A power which is releasable may be released with respect to the whole or any part of the property subject to such power and may also be released in such manner as to reduce or limit the persons or objects, or classes of persons or objects, in whose favor such powers would otherwise be exercisable. No release of a power shall be deemed to make imperative a power which was not imperative prior to such release, unless the instrument of release expressly so provides.

"3. Such release may be delivered to any of the following:

"(a) Any person specified for such purpose in the instrument creating the power.

"(b) Any trustee of the property to which the power relates.

"(c) Any person, other than the donee, who could be adversely affected by an exercise of the power.

"(d) The county recorder of the county in which the donee resides,

part of this movement. It is a soundly conceived and useful statute. If, however, a general statute on powers of appointment is to be enacted there are two particulars in which the statute can be improved. One involves only a matter of words. The present statute excludes from releasability any "power in trust which is imperative." The idea of this exclusion is sound. No change of substance would be made if the words "in trust" were omitted. If a power is "imperative" it is necessarily "in trust." A twice saying of the same thing is not good statutory drafting. The second matter is more substantial. California has correctly taken the position that a power created, in terms, so as to be exercisable only by will, cannot be effectively exercised by inter vivos conduct by the donee.<sup>64</sup> The provisions of California Civil Code section 1060, as they presently exist, permit this rule of California (and of the common law) to be nullified. Suppose that A creates a trust for the benefit of his wife B for life and also confers on B a general testamentary power of appointment. B (under present section 1060) can release this power as to all persons except X, and can expressly specify in the release that her residual power shall be imperative. B has, by inter vivos act fully exercised the power, which the creator of the power intended to remain unexercised until B's death. This possibility of using the statute to nullify the donor's intent would be prevented if there were added at the end of the second paragraph of section 1060 (see its text in note 63) the phrase, "nor shall any release of a power be permissible when the effect of the release is an inter vivos exercise of a solely testamentary power." With the two suggested changes, one purely semantic, the other precautionary, California Civil Code section 1060 deserves to be retained as an integral part of any proposed new statute on this topic.

California Probate Code section 125,<sup>65</sup> dates back to the California Statutes of 1850.<sup>66</sup> It was probably borrowed from the similar pro-

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or has a place of business, or in which the deed, will or other instrument creating the power is filed, and from the time of filing the same for record, notice is imparted to all persons of the contents thereof.

"4. All releases heretofore made which substantially comply with the foregoing requirements are hereby validated. The enactment of this section shall not impair, nor be construed to impair, the validity of any release heretofore made."

<sup>64</sup> *Childs v. Gross*, 41 Cal. App. 2d 680, 107 P.2d 424 (1940); *Briggs v. Briggs*, 122 Cal. App. 2d 766, 265 P.2d 587 (1954). This is also sound common law. See RESTATEMENT § 346(a).

<sup>65</sup> Its text is as follows:

"A devise or bequest of all the testator's real or personal property, in express terms, or in any other terms denoting his intent to dispose of all his real or personal property, passes all the real or personal property which he was entitled to dispose of by will at the time of his death, including property embraced in a power to devise."

<sup>66</sup> CAL. PROB. CODE § 125 was enacted by Cal. Stats. 1931, ch. 281, § 125,

vision inserted in the New York Revised Statutes of 1830, and still retained in New York.<sup>67</sup> When the donee of a power, by his will, has made a gift of the residue of his estate, or otherwise has manifested an intent to pass all of his property, *but has failed to mention his power or the property subject thereto*, the common law inference was that he had failed to exercise the power.<sup>68</sup> Thus the rule of California Probate Code section 125 is the exact opposite of the common law rule. Some states have a statute applying the rule of Probate Code section 125 only to general powers. The California statute led to a complete frustration of the clearly provable intent of the donee in *Estate of Carter* in 1956.<sup>69</sup> The present statute provides an undesirable pitfall for the unwary. Wisconsin, faced with the same problem in 1965, greatly qualified its prior acceptance of the New York-California provision by restricting the rule to general powers where no gift in default is found.<sup>70</sup> In any general reworking of the California law on powers, it is strongly urged that we either return wholly to the common law rule, or eliminate the "trap" quality of Probate Code section 125 in the manner done in 1965 by Wisconsin.

With respect to taxation the provisions of the federal estate tax are not subject to modification by state legislation. There is, nevertheless, one provision of the Internal Revenue Code of 1954 which deserves careful thought. By section 2041(b)(1) of that Code, a general power is defined as a power which is "exercisable in favor of the decedent, his estate, his creditors or creditors of his estate," with certain stated exceptions. This definition has been borrowed, without its tax exceptions, in the recent statutory revisions of New York,<sup>71</sup> Wisconsin<sup>72</sup> and Michigan.<sup>73</sup> It was also borrowed with the exceptions included for tax purposes in the California Revenue and Taxation Code section 13692 enacted in 1965.

For purposes of definition in a general statute on powers of appointment would it not be wise to use the same concept of a "gen-

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at 594, and was based on Cal. Civ. Code §§ 1330-31, Cal. Stats. 1850, ch. 72, § 22, at 179 (repealed 1874).

<sup>67</sup> N.Y. ESTATES, POWERS & TRUSTS LAW § 10-6.1(a)(4) (McKinney 1967).

<sup>68</sup> 3 POWELL ¶ 397 n.18 cites cases so holding from the Fifth Circuit and from Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Iowa, Maryland, Missouri, New Hampshire, New Jersey, Ohio, Pennsylvania, Rhode Island, South Carolina and Texas.

This is the rule embodied in RESTATEMENT § 343. See also collection of cases in Annot., 16 A.L.R.3d 911 (1967).

<sup>69</sup> 47 Cal. 2d 200, 302 P.2d 301, noted in 95 TRUSTS & ESTATES 1168 (1956).

<sup>70</sup> WIS. STAT. § 232.03(1)(2) (1965). See generally Effland, *Powers of Appointment—The New Wisconsin Law*, 1967 WIS. L. REV. 583, 589.

<sup>71</sup> N.Y. ESTATE, POWERS & TRUST LAW § 10-3.2(b) (McKinney 1967).

<sup>72</sup> WIS. STAT. § 232.01(4) (1965).

<sup>73</sup> MICH. STAT. § 26.155(102)(h) (Supp. 1967).

eral power" as is now used in the federal estate tax, in the California inheritance tax and in the recently revised statutes of New York, Wisconsin and Michigan? These states borrowed the wording of Internal Revenue Code of 1954, section 2041(b)(1), without the exceptions needed for tax purposes in the federal estate and in the California inheritance tax statutes. A like simplification of form would serve well in California.

The treatment of appointive assets under the California inheritance tax has differed in five periods spanning the time from 1905 to the present.<sup>74</sup> This segment of the state's tax system was reviewed with care, prior to the enactment<sup>75</sup> of the present form of the statute in 1965. No reconsideration of this aspect of the California law on powers of appointment is desirable at this time.

This survey of the statutory ingredient in the law of California on powers of appointment has shown that California Civil Code section 1060 (on releasability) is generally good, but needs minor changes; that Probate Code section 125 (silent exercise of a power) deserves either elimination or substantial curtailment; that the Internal Revenue Code of 1954, in defining the term "general power" uses language which could profitably be incorporated in a general statute on powers; and that the California inheritance tax, completely revised in 1965, deserves to be left alone. The quantum of statutory departures from the common law is not substantial.

### The Need in California for a Fairly Inclusive Statute

California is now in the position which, within the past 4 years, has been met and handled in the states of New York (1964), Wisconsin (1965) and Michigan (1967). In each of these states it has been declared that it has the common law of powers, except as modified by statute.<sup>76</sup> These declarations are the exact equivalent of the

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<sup>74</sup> Estate of Newton, 35 Cal. 2d 830, 831, 221 P.2d 952, 952-53 (1950), traced the treatments in the first four of these five periods.

<sup>75</sup> Cal. Stats. 1965, ch. 1070, § 6, at 2716-19. These provisions constitute CAL. REV. & TAX. CODE §§ 13691-701.

<sup>76</sup> The writer of this article drafted N.Y. Real Property Laws § 130, ch. 864, § 1, [1964] N.Y. Laws 2322, as follows:

"The common law of powers, both as embodied in sections of this article, and as to topics left uncovered by the sections of this article, is *established* as the law of this state, except as specifically modified by provisions in the sections of this article." (emphasis added). This, with verbal changes which are no improvement, is now N.Y. ESTATES, POWERS & TRUSTS LAW § 10-1.1 (McKinney Supp. 1967).

WIS. STAT. § 232.19 (1965) states:

"As to all matters within the scope of those sections of ch. 232 (Stat. 1963) which have been repealed, and not within this chapter or any other applicable statute, the common law is to govern." (emphasis added).

MICH. STAT. § 26.155(119) (Supp. 1967) states:

1935 California decision in *Estate of Sloan*.<sup>77</sup>

When the writer was working on the New York problem in 1963, the Temporary Commission on Estates, in a letter dated April 5, 1963, directed the writer

not merely to restore the common law (with deviations) but to spell out as far as feasible what the common law is.

The wisdom of this direction is evidenced by the following of its dictates in the legislation of New York in 1964; in the New York Estates, Powers and Trust Law, effective September 1, 1967; in the Wisconsin legislation of 1965 and in the Michigan legislation of 1967. There is no need to include in the statute a coverage of all the points possibly litigable concerning powers of appointment. The bar and the courts will be greatly helped, and the public interest will be served, by a statute which does spell out the "common law of California," on the core points as to which litigation can fairly be anticipated. This will eliminate the need for expensive research into the decisions of England and of our sister states as to the content of the common law on powers. At present the *Restatement of Property* can be regarded as probably a fair presentation of the common law, but a careful lawyer will feel compelled to dig out the decisions and to weigh their conflicting ideas. So also will the careful judge. A declaratory statute will greatly minimize this wasteful process for both the bar and the bench.

In the proposal which the writer submitted in 1967 to the California Law Revision Commission<sup>78</sup> there are 32 sections. Two of these embody the modifications in California Civil Code section 1060 (section 12) and in Probate Code section 125 (section 17), hereinbefore discussed; one (section 1) embodies the general acceptance of the common law of powers, required by *Estate of Sloan*;<sup>79</sup> 23 (sections 2-8, 13-16, 19-30) are declaratory of the common law, including some points heretofore passed on by the courts of this state; two (sections 31 and 32) concern the applicable law and severability; three (sections 9-11) deal with the rights of creditors of a donee;<sup>80</sup> and one

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"As to all matters not within this act or any other applicable statute, the common law is to govern." (emphasis added).

These three recent statutes are discussed (as to New York) in Powell, *The New Powers of Appointment Act*, 103 TRUSTS & ESTATES 807 (1964); Comment, *Powers of Appointment—The New York Revision*, 65 COLUM. L. REV. 1289 (1965); (as to Wisconsin) Effland, *Powers of Appointment—The New Wisconsin Law*, 1967 WIS. L. REV. 583; (as to Michigan) BROWDER, FIRST ANNUAL REPORT, STUDY OF MICHIGAN STATUTES ON POWERS OF APPOINTMENT 50-81 (1967).

<sup>77</sup> 7 Cal. App. 2d 319, 46 P.2d 1007 (discussed in text accompanying notes 27-29 *supra*).

<sup>78</sup> This proposal is Appendix A to this article.

<sup>79</sup> See text accompanying notes 27-29 *supra*.

<sup>80</sup> See text accompanying notes 82-90 *infra*.

(section 18) substitutes the modern constructional preference for exclusive powers for the anachronistic rule on this point applied in *Estate of Sloan*.<sup>81</sup> The remainder of this article consists of the reasons for the four provisions last above mentioned.

### Rights of Creditors of the Donee of a General Power

Historically, and traditionally, the appointee took directly from the donor and not from the donee. Chief Justice Gibson, in a Pennsylvania case of 1849, expressed this historical view thus:

There is such flagrant injustice in applying the bounty of a testator to the benefit of those for whom it was not intended [the creditors of the donee], that the mind revolts from it. An appointee derives title immediately from the donor of the power, by the instrument in which it was created; and consequently not under but paramount to the appointor, by whom it was executed: by reason of which it is impossible to conceive that the appointor's creditors have an equity. A man who is employed to manage the conduit-pipe of another's munificence, is authorized by a general power of disposal to turn the stream of it to any person or point within the compass of his discretion; and his creditors have no right in justice or reason to control him performing his function because it was not assigned to him as their trustee. It is the bounty of the testator, and not the property of his steward, that is to be dispensed.<sup>82</sup>

Despite the historical accuracy of Gibson's position, realities prevailed over theory. The English chancellors developed what came to be known as the "doctrine of equitable assets." This is reputed to have been an effort "to foster credit" in a society where creditors had much influence. Under this doctrine, if a debtor was the donee of a general power, and *he exercised it in favor of a volunteer*, his creditors could reach the appointive assets, in priority to his appointees, provided the debtor lacked other assets to pay the creditor.<sup>83</sup> This doctrine is embodied in the *Restatement of Property* as sound common law doctrine.<sup>84</sup> This is the doctrine which Mr. Justice Traynor used as the basis for an analogy in 1940.<sup>85</sup> It was an adequate, but not a necessary basis for the 1956 decision in *Estate of Masson*.<sup>86</sup>

The doctrine of equitable assets was an improvement on the law which existed before it, but it did not go far enough. The donee of a general power, before its exercise, has substantially the equivalent of full ownership. The Internal Revenue Code, since 1942, has required that a donee having a general power to appoint include the appointive assets in his gross estate.<sup>87</sup> The California Revenue and Taxation

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<sup>81</sup> See text accompanying notes 27-29 *supra* and notes 91-96 *infra*.

<sup>82</sup> *Commonwealth v. Duffield*, 12 Pa. 277, 279-80 (1849).

<sup>83</sup> 3 POWELL ¶ 389.

<sup>84</sup> RESTATEMENT §§ 329, 330.

<sup>85</sup> *Estate of Kalt*, 16 Cal. 2d 807, 108 P.2d 401 (1940).

<sup>86</sup> 142 Cal. App. 2d 510, 298 P.2d 619 (1956).

<sup>87</sup> Revenue Act of 1942, § 811(f), 56 Stat. 942 (now INT. REV. CODE OF 1954, § 2041).

Code was amended in 1965, so that a taxable inheritance occurs whenever a person takes either by the exercise or the nonexercise of a general power.<sup>88</sup> Thus, on death, both the federal and California statutes treat a general power as the equivalent of full ownership. If this is true as to taxes, why should it not also be true as to creditors? The Federal Bankruptcy Act has taken this position as to all general powers of the bankrupt presently exercisable at the moment of bankruptcy.<sup>89</sup> The statutes enacted in Minnesota (1943), in New York (1964), in Wisconsin (1965), and in Michigan (1967), have extended this same rule to all creditors of the donee of a general power.<sup>90</sup>

<sup>88</sup> CAL. REV. & TAX. CODE § 13696.

<sup>89</sup> 11 U.S.C. § 110(a) (3) (1964) (originally enacted 1938). See also RESTATEMENT § 331.

<sup>90</sup> Ch. 322, § 10 [1943] Minn. Laws 440, *as amended*, Ch. 206, § 1 [1947] Minn. Laws (now MINN. STAT. § 502.70 (Supp. 1967)) provides:

"When a donee is authorized either to appoint to himself or to appoint to his estate all or part of the property covered by a power of appointment, a creditor of the donee, during the life of the donee, may subject to his claim all property which the donee could then appoint to himself and, after the death of the donee, may subject to his claim all property which the donee could at his death have appointed to his estate, but only to the extent that other property available for the payment of his claim is insufficient for such payment. When a donee has exercised such a power by deed, the rules relating to fraudulent conveyances shall apply as if the property transferred to the appointee had been owned by the donee. When a donee has exercised such a power by will in favor of a taker without value or in favor of a creditor, a creditor of the donee or a creditor of his estate may subject such property to the payment of his claim, but only to the extent that other property available for the payment of the claim is insufficient for such payment."

Ch. 864, § 139 [1964] N.Y. Laws 1568, enacted the provision which now appears in N.Y. ESTATE, POWERS & TRUSTS LAW § 10-7.2 (McKinney 1967). In an earlier section (§ 10-3.2(b)) this statute used the language of INT. REV. CODE OF 1954, § 2041(b), defining a general power as one exercisable wholly in favor of the donee, his estate, his creditors or creditors of his estate. It then provides:

"Property covered by a general power of appointment which is presently exercisable or of a postponed power which has become exercisable, is subject to the payment of the claims of creditors of the donee, his estate and the expenses of administering his estate. It is immaterial whether the power was created in the donee by himself or by some other person, or whether the donee has or has not purported to exercise the power."

It will be noted that this statute is somewhat more favorable to creditors than the Minnesota statute.

WIS. STAT. §§ 232.01(4), 232.17 (Supp. 1967) uses the Internal Revenue Code definition of a general power (§ 232.01(4)) and then provides (§ 232.17) a still broader ability of creditors to reach the appointive assets:

"232.17 Rights of Creditors of the donee.

"(1) General Policy. If the donee has either a general power or an unclassified power which is unlimited as to permissible appointees except for exclusion of the donee, his estate, his creditors and the creditors of his estate, or a substantially similar exclusion, any interest which the donee has power to appoint or has appointed is to be treated as property of the donee for purposes of satisfying claims of his creditors, as provided in this section.

"(2) During lifetime of the donee. If the donee has an unexercised power of the kinds specified in sub. (1), and he can presently exercise such



The proposed statute for California, in sections 9-11, brings the state abreast of modern realities, as has heretofore been done in four sister states.

### Exclusive vs. Nonexclusive Powers

There is one problem on which the California decision, purportedly based on the court's understanding of the common law, deviates so markedly from today's general understanding of the common law, that this proposed statute should provide a remedy. This problem concerns only special powers. *Estate of Sloan*<sup>91</sup> held that where, by will, a father provided that if his son died before reaching the age of 30, the property should go to the heirs of the son as the son's will directed; the son could not lawfully exercise the power by giving all the assets to one maternal aunt, to the exclusion of two paternal aunts, all three being "heirs" of the son at his death. This embodies

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a power, any creditor of the donee may by appropriate proceedings reach any interest which the donee could appoint, to the extent that the donee's individual assets are insufficient to satisfy the creditor's claim. Such an interest is to be treated as property of the donee within ch. 273. If the donee has exercised such a power, the creditor can reach the appointed interests to the same extent that under the law relating to fraudulent conveyances he could reach property which the donee has owned and transferred.

"(3) At death of the donee. If the donee has at the time of his death a power of the kinds specified in sub. (1), whether or not he exercises the power, any creditor of the donee may reach any interest which the donee could have appointed or has appointed, to the extent that the claim of the creditor has been filed and allowed in the donee's estate but not paid because the assets of the estate are insufficient."

MICH. STAT. § 26.155(113) (Supp. 1967) provides:

"Sec. 113. (1) If the donee has a general power of appointment, any interest which the donee has power to appoint or has appointed is to be treated as property of the donee for the purposes of satisfying claims of his creditors, as provided in this section.

"(2) If the donee has an unexercised general power of appointment and he can presently exercise such a power, any creditor of the donee may by appropriate proceedings reach any interest which the donee could appoint, to the extent that the donee's individual assets are insufficient to satisfy the creditor's claim. If the donee has exercised the power, the creditor can reach the appointed interests to the same extent that under the law relating to fraudulent conveyances he could reach property which the donee has owned and transferred.

"(3) If the donee has at the time of his death a general power of appointment, whether or not he exercises the power, the executor or other legal representative of the donee may reach on behalf of creditors any interest which the donee could have appointed to the extent that the claim of any creditor has been filed and allowed in the donee's estate but not paid because the assets of the estate are insufficient.

"(4) Under a general assignment by the donee for the benefit of his creditors, the assignee may exercise any right which a creditor of the donee would have under subsection (2)."

<sup>91</sup> 7 Cal. App. 2d 319, 46 P.2d 1007 (1935) (discussed in text accompanying notes 27-29 *supra*).

a constructional preference for the nonexclusionary power. It may, perhaps, once have been good common law. The now long accepted common law view is the direct opposite. *Restatement of Property* section 360 is entitled "Whether a Power is Exclusive or Non-Exclusive." Its text is as follows:

The donee of a special power may, by an otherwise effective appointment, exclude one or more objects of the power from distribution of the property covered thereby unless the donor manifests a contrary intent.

It will be noted that this reverses the constructional preference stated in *Estate of Sloan*, and creates a constructional preference in favor of the donee's full liberty of choice among the permissible appointees. If the donor wishes, he can, by appropriate additional language, lessen the donee's full liberty of choice. The many authorities on this problem are cited and discussed in *Powell on Real Property* paragraph 398.<sup>92</sup> This same constructional preference for "exclusive" powers is embodied in the recently drafted statutes of New York,<sup>93</sup> Wisconsin,<sup>94</sup> and Michigan.<sup>95</sup>

It is recommended that the proposed new statute include a section bringing the California law into conformity with the modern understanding of the common law on this point.<sup>96</sup>

### Conclusion

The enactment of the proposed new statute on powers of appointment:

- (1) Will eliminate slight difficulties in present California Civil Code section 1060;
- (2) Will greatly lessen the bad features of California Probate Code section 125;
- (3) Will substitute the modern constructional preference for exclusive powers for the mistaken view of *Estate of Sloan* on this point;

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<sup>92</sup> 3 POWELL ¶ 398, at 378.49 states: "A special power can be either 'exclusive' or 'nonexclusive.' This means that the donee, under the authority conferred upon him by the donor, may be authorized either to give the appointive assets wholly to one or more of the objects, excluding others of the objects (in which case the power is said to be 'exclusive') or to give the appointive assets in shares to be determined by the donee, but to some extent giving something to every one of the permissible appointees (in which case the power is said to be 'nonexclusive'). The constructional preference is for the finding of exclusive powers [citing decisions from Kentucky, Maine, New Jersey, New York and Pennsylvania]."

<sup>93</sup> N.Y. ESTATES, POWERS & TRUSTS LAW § 10-6.5 (McKinney 1967).

<sup>94</sup> WIS. STAT. § 232.07 (1965).

<sup>95</sup> MICH. STAT. § 26.155(107) (Supp. 1967).

<sup>96</sup> See Appendix A, at § 18.

- (4) Will conform the treatment of creditors of the donee of a general power to widely accepted modern views;
- (5) Will spell out the content of the common law of powers on many points, some of which have already been accepted in California decisions; and will confirm the position accepted in California since 1935 that the common law of powers is the available reservoir on points not covered in statutes.

## Appendix A

### The Proposed Statute

#### Chapter— Powers of Appointment

- Section 1. Common law of powers of appointment established, with exceptions.
2. Classification of powers of appointment; general and special.
3. Classification of powers of appointment as to time of exercise; presently exercisable, testamentary and otherwise postponed.
4. Classification of powers of appointment; imperative and discretionary.
5. Classification of powers of appointment; exclusive and nonexclusive.
6. Creation of a power of appointment.
7. Scope of the authority of the donee.
8. Creditors of the donee; special power.
9. Creditors of the donee; general power presently exercisable.
10. Creditors of the donee; power subject to a condition.
11. Creditors of the donee; general power not presently exercisable.
12. Release of a power of appointment.
13. Contract to appoint; power presently exercisable.
14. Contract to appoint; power not presently exercisable.
15. Exercise of a power; prerequisite formalities.
1. Capacity of a donee.
  2. Conformity to donor's directions, with exception.
  3. Disregard of donor's insufficient requirements.
  4. Disregard of donor's excessive requirements.
  5. Specific reference to power where donor has required it.
  6. Required consents, with mitigations.
  7. Required uniting by two or more donees, with mitigations.
  8. Equitable power to remedy defect in formalities.
16. Exercise of a power; instrument executed before the power was created.
17. Exercise of a power; what constitutes.
18. Exercise of a power; two or more permissible appointees.
19. Exercise of a power; permissible types of appointment under a general power.
20. Exercise of a power; permissible types of appointment under a special power.
21. Exercise of a power; fraud on special power.
22. Exercise of a power; void as to excess only.
23. Exercise of a power; lapse.
24. Rule against perpetuities; time at which permissible period begins.
25. Rule against perpetuities; facts to be considered.
26. Imperative power; effectuation.
27. Appointment to a trustee on a trust which fails; capture.
28. Appointment assuming control of the appointive assets for all purposes; capture.
29. Ineffective appointment; effect of.
30. Irrevocability; creation, exercise or release of a power.
31. Applicable law.
32. Constitutionality; severability clause.

*Section 1. Common law of powers of appointment established, with exceptions.*

The common law as to powers of appointment is the law of California, both as to topics dealt with in this chapter and as to topics left uncovered thereby, except as specifically modified by provisions in the sections of this chapter and of the Revenue and Taxation Code of this state.

**AUTHOR'S NOTE:** This is substantially identical with N.Y. REAL PROPERTY LAW § 130 (McKinney Supp. 1967), adopted by ch. 864, [1964] N.Y. Laws 2322 [hereinafter cited as N.Y. 1964]; with WIS. STAT. § 232.19 (Supp. 1967), adopted by ch. 52, § 5, [1965-1] Wis. Laws 65 [hereinafter cited as Wis. 1965]; and with MICH. STAT. ANN. § 19 (1967) (Powers of Appointment Act) [hereinafter cited as MICH. 1967]. It avoids the loose and ambiguous language of N.Y. ESTATES, POWERS & TRUSTS LAW § 10-1.1 (McKinney 1967) [hereinafter cited as E.P.T.L.].

*Section 2. Classification of powers of appointment; general and special.*

1. A power of appointment is general to the extent that it is exercisable wholly in favor of the donee, his estate, his creditor or creditors of his estate.

2. All other powers of appointment are special.

**AUTHOR'S NOTE:** This is identical with N.Y. 1964, § 133; and is very similar both to Wis. 1965, § 232.01(4) and to MICH. 1967, § 2(H). It departs from the common law, as embodied in the RESTATEMENT OF PROPERTY § 320 (1940) [hereinafter cited as RESTATEMENT] by employing the definitional language of INT. REV. CODE OF 1954, § 2041(b)(1) (federal estate tax law), which, in 1965, was incorporated into CAL. REV. & TAX. CODE § 13692. The exceptions stated in these two tax statutes have an importance significant only in tax problems. The omission of these exceptions from this draft follows the example of N.Y. 1964, Wis. 1965, and MICH. 1967.

*Section 3. Classification of powers of appointment as to time of exercise; presently exercisable, testamentary and otherwise postponed.*

1. A power of appointment is presently exercisable whenever the donor has not manifested an intent that its exercise is postponed.

2. A power of appointment is testamentary whenever the donor has manifested an intent that it is to be exercised only by a will of the donee.

3. A power of appointment which is neither presently exercisable nor testamentary is a postponed power.

**AUTHOR'S NOTE:** This is identical with N.Y. 1964, § 134. It is similar to MICH. 1967, § 2(L). It avoids the muddy wording of E.P.T.L. § 10-3.3. It follows the common law as embodied in RESTATEMENT § 321.

*Section 4. Classification of powers of appointment; imperative and discretionary.*

1. A power of appointment is imperative when the donor has manifested an intent that the donee has a duty to exercise it. Such a duty can exist even though the donee has the privilege of selecting some and excluding others of the designated permissible appointees.

2. A power of appointment is discretionary when it is not imperative within the terms of subsection 1 of this section. The donee of a discretionary power is privileged to exercise, or not to exercise the power as he chooses.

**AUTHOR'S NOTE:** This is substantially similar to N.Y. 1964, § 135 and to E.P.T.L. § 10-3.4. It follows the suggestion in RESTATEMENT § 320, Special Note, namely that the term "powers in trust" has too many different meanings to make it a useful term. As to the consequences which flow from a power being "mandatory," see section 26 *infra*.

### *Section 5. Classification of powers of appointment; exclusive and nonexclusive.*

1. A power of appointment is exclusive if it is a special power and if it may be exercised in favor of one or more of the permissible appointees to the exclusion of the others.

2. A power of appointment is nonexclusive when it is not exclusive within the terms of subsection 1 of this section.

**AUTHOR'S NOTE:** This is roughly similar to E.P.T.L. § 10-3.2(2) (d) and (e). This definition is important as a basis for the later section 18 in this statute dealing with the constructional preference for exclusive powers, which embodies the common law of RESTATEMENT § 360.

### *Section 6. Creation of a power of appointment.*

The donor of a power of appointment:

(a) must be a person capable of transferring the interest in property as to which the power relates; and

(b) must have executed the instrument claimed to create the power in the manner required by law for such an instrument; and

(c) must manifest an intent to confer the power on a person capable of holding the interest in property as to which the power relates; and

(d) cannot nullify or alter the rights of creditors of the donee, as defined in the succeeding sections of this chapter, by any language in the instrument creating the power, purporting to give to the interest of such donee a spendthrift character.

**AUTHOR'S NOTE:** This is identical with N.Y. 1964, § 136. Subsections (a) and (b) are substantially like Mich. 1967, § 3. Subsections (a)-(c) are clearly present law both in California and at common law. See RESTATEMENT § 323. Subsection (d) is a point not heretofore considered in California. The position it takes was taken in N.Y. 1964, § 136 and E.P.T.L. § 10-4.1(4). It prevents a spread of the spendthrift trust idea and is necessary to prevent Treas. Reg. § 20.2056(b)-5(f) (7) (1958) from applying.

### *Section 7. Scope of the authority of the donee.*

The scope of the authority of the donee to determine appointees and to select the time and manner of the appointment or appointments is unlimited except as the donor effectively manifests a contrary intention.

**AUTHOR'S NOTE:** This embodies the common law rule of RESTATEMENT § 324 and is substantially identical with N.Y. 1964, § 137 and E.P.T.L. § 10-5.1.

### *Section 8. Creditors of the donee; special power.*

Property covered by a special power of appointment cannot be subjected to payment of the claims of creditors of the donee, or of his estate or to the expenses of the administration of his estate.

**AUTHOR'S NOTE:** This is sound common law. See RESTATEMENT § 326. Since, by definition of a special power (section 2(2) *supra*) the donee of such a power has nothing comparable to ownership of the appointive assets, it is reasonable to bar his creditors from reaching the appointive assets. This section as proposed is identical with N.Y. 1964, § 138 and with E.P.T.L. § 10-7.1. Wis. 1965, § 232.17(1) goes farther in giving creditors of a donee power to reach the appointive assets, whenever the power "is unlimited as to permissible appointees except for exclusion of the donee, his estate, his creditors and the creditors of his estate, or a substantially similar exclusion." This extension of the rights of creditors of the donee in the case of some special powers is not believed to be worth the complexity thereby introduced into the law. Furthermore, limitations within the proposed extension are not likely of occurrence.

### *Section 9. Creditors of the donee; general power presently exercisable.*

Property covered by a general power of appointment which is, or has become, presently exercisable, is subject to the payment of the claims of creditors of the donee, his estate and the expenses of administering his estate. It is immaterial whether the power was created in the donee by himself, or by some other person. It is also immaterial whether the donee has, or has not purported to exercise the power, and whether the power originally had been exercisable only by will.

**AUTHOR'S NOTE:** This is substantially identical with N.Y. 1964, § 139; E.P.T.L. § 10-7.2; Wis. 1965, § 232.17(1); and MICH. 1967, § 13. It is largely identical with ch. 322 [1943] Minn. Laws 439, enacting MINN. STAT. § 502.70 (1965) [hereinafter cited as MINN. 1943].

This is a departure from the common law as embodied in RESTATEMENT §§ 327-30. When a power to appoint is both general and presently exercisable, the donee has, in substance, the equivalent of ownership as to the appointive assets. Neither the traditional rule that the "appointee takes from the donor" nor the English doctrine of equitable assets should prevent the creditors of such a donee from reaching the appointive assets for the satisfaction of their established claims. Neither is there any justification for retaining the anachronistic remnant of the common law (as

Mich., Minn., and Wis.) that the appointive assets can be reached "only to the extent that other property available for the payment of his claim is insufficient for such payment."

*Section 10. Creditors of the donee; power subject to a condition.*

A general power of appointment may be created subject to a condition precedent. Until such condition is fulfilled, the rule stated in section 9 is inapplicable.

**AUTHOR'S NOTE:** This is substantially identical with N.Y. 1964, § 140, and with E.P.T.L. § 10-7.3. It is, perhaps, unnecessary but serves some precautionary purposes.

*Section 11. Creditors of the donee; general power not presently exercisable.*

Property covered by a general power of appointment, which, by the terms of its creation was made not presently exercisable, can be subjected to the payment of the claims of creditors of the donee, or of his estate, or to the expenses of the administration of his estate

(a) if the power was created by the donee in favor of himself; or

(b) if the power has become presently exercisable in accordance with the terms of the creating instrument.

**AUTHOR'S NOTE:** This is substantially identical with N.Y. 1964, § 141, and with E.P.T.L. § 10-7.4, except that the New York statutes do not apply to testamentary powers which have become presently exercisable by the death of the donee. This writer opposed the exclusion of testamentary powers which had become presently exercisable, on the ground that the appointive assets have come under the complete power of disposition by the debtor donee and hence should be treated exactly the same as are the other assets of such decedent. This is the sound position taken in Wis. 1965, § 232.17(3), and in MICH. 1967, § 13(3).

The provision in subsection (a) is good common law. See RESTATEMENT § 328. The provision in subsection (b) is a reasonable corollary of section 9 *supra*.

*Section 12. Release of a power of appointment.*

1. Any power, which is exercisable by deed, by will, by deed or will, or otherwise, whether general or special, other than a power\* which is imperative, is releasable, either with or without consideration, by written instrument signed by the donee and delivered as hereinafter provided unless the instrument creating the power provides otherwise.

2. A power which is releasable may be released with respect to the whole or any part of the property subject to such power and may also be released in such manner as to reduce or limit the persons or objects, or classes of persons or objects, in whose favor such power



would otherwise be exercisable. No release of a power shall be deemed to make imperative a power which was not imperative prior to such release, unless the instrument of release expressly so provides; nor shall any release of a power be permissible when the result of the release is an inter vivos exercise of a solely testamentary power.

3. Such release may be delivered to any of the following:

(a) any person specified for such purpose in the instrument creating the power;

(b) any trustee of the property to which the power relates;

(c) any person, other than the donee, who could be adversely affected by an exercise of the power;

(d) the county recorder of the county in which the donee resides, or has a place of business, or in which the deed, will or other instrument creating the power is filed, and from the time of filing the same for record, notice is imparted to all persons of the contents thereof.

4. All releases heretofore made which substantially comply with the foregoing requirements are hereby validated. The enactment of this section shall not impair, nor be construed to impair, the validity of any release heretofore made.

**AUTHOR'S NOTE:** This section is identical with CAL. CIV. CODE § 1060, enacted by Cal. Stats. 1945, ch. 318, § 1, at 777, except in two particulars:

(1) At the point marked with an asterisk the words "in trust" have been omitted, on the ground that they are fully covered by the phrase "which is imperative."

(2) The underlined last 25 words of subsection 2 have been inserted for reasons set forth in the text accompanying footnotes 63 and 64 *supra*. It is believed that these words are necessary to effect the common law rule embodied in RESTATEMENT § 346(a) and used as the basis for the results in *Childs v. Gross*, 41 Cal. App. 2d 680, 107 P.2d 424 (1940), and *Briggs v. Briggs*, 122 Cal. App. 2d 766, 265 P.2d 587 (1954).

### *Section 13. Contract to appoint; power presently exercisable.*

The donee of a power to appoint presently exercisable, whether general or special, can effectively contract to make an appointment, if neither the contract, nor the promised appointment, confers a benefit upon a person who is not a permissible appointee under the power.

**AUTHOR'S NOTE:** This is accepted common law. See RESTATEMENT § 339. It is identical with N.Y. 1964, § 145; E.P.T.L. § 10-5.2; and MICH. 1967, § 10(1).

### *Section 14. Contract to appoint; power not presently exercisable.*

The donee of a power to appoint which is not presently exercisable cannot effectively contract to make an appointment. If the promise to make an appointment is not performed, the promisee can-

not obtain either specific performance or damages, but he can obtain restitution of the value given by him for the promise.

**AUTHOR'S NOTE:** This is accepted common law. See RESTATEMENT § 340. It is identical with N.Y. 1964, § 146(1); E.P.T.L. § 10-5.3; and MICH. 1967, § 10(2). It intentionally omits N.Y. 1964, § 146(2) in order to conform to California decisions. See note appended to section 12, *supra*, as to the 25 words proposed for insertion in section 2 of present CAL. Civ. Code § 1060.

*Section 15. Exercise of a power; prerequisite formalities.*

1. An effective exercise of a power of appointment can be made only by a donee capable of transferring the interest in property to which the power relates.

**AUTHOR'S NOTE:** This is accepted common law. RESTATEMENT § 345. It is substantially identical with MICH. 1967, § 5(1); MINN. 1943, § 502.66; and WIS. 1965, § 232.05(1).

2. An effective exercise of a power of appointment can be made only by a written instrument which complies with the requirements, if any, of the creating instrument as to the manner, time and conditions of the exercise of the power, except that a power stated to be exercisable only by deed is also exercisable by a written will executed as required by law.

**AUTHOR'S NOTE:** Down to the "except" clause, this is accepted common law. See RESTATEMENT § 346. Without the "except" clause, this is substantially identical with WIS. 1965, § 232.05(2). The rule embodied in the "except" clause first appeared in MINN. 1943, § 502.64, and has been the law in that state for 24 years. A similar "except" clause appears in N.Y. 1964, § 148(3) and in MICH. 1967, § 5(2). Few conveyors prescribe that a power of appointment can be exercised *only* by an *inter vivos* instrument. If and when such a prescription is encountered, it is reasonable to say that "all purposes of substance which the donor could have had in mind are accomplished by a will of the donee." The RESTATEMENT § 347, comment b, comes very close to adopting the "except" clause as sound common law.

3. An effective exercise of a power of appointment can be made by an instrument conforming to the requirements of subsection 2, when the donor has authorized the power to be exercised by an instrument not sufficient in law to pass the appointive assets, and such clause does not invalidate the power.

**AUTHOR'S NOTE:** This is substantially identical with MICH. 1967, § 5(3) and with N.Y. 1964, § 148(1).

4. An effective exercise of a power of appointment can be made by an instrument conforming to the requirements of subsection 2, without observance of additional formalities directed by the donor to be observed in its exercise.

**AUTHOR'S NOTE:** This is substantially identical with MINN. 1943, § 502.65; N.Y. 1964, § 148(2); and E.P.T.L. § 10-6.2(2). It is more liberal than the common law rule embodied in RESTATEMENT § 346.

5. An effective exercise of a power of appointment can only be

made by an instrument which contains a specific reference to the power or to the instrument creating the power, if the instrument creating the power has so explicitly directed.

**AUTHOR'S NOTE:** This subsection is a part of the proposed modification of CAL. PROB. CODE § 125, set forth in section 17(d) *infra*. It embodies the provision of WIS. 1965, § 232.03(1) and of the last sentence in MICH. 1967, § 4.

6. An effective exercise of a power of appointment, which, by the terms of its creating instrument requires the consent of the donor, or of some other person, can only be made when the required consent is contained in the instrument of exercise or in a separate written instrument, signed, in each case by the person or persons whose consents are required. If any person whose consent is required dies or becomes legally incapable of consenting, the power may be exercised by the donee, without the consent of that person, unless the creating instrument explicitly forbids.

**AUTHOR'S NOTE:** This embodies the rule first stated in MINN. 1943, § 502.68. It was also adopted in N.Y. 1964, § 150; E.P.T.L. § 10-6.4; WIS. 1965, § 232.05(3); and MICH. 1967, § 5(4).

7. An effective exercise of a power of appointment created in favor of two or more donees, can only be made when all of the donees unite in its exercise; but if one or more of the donees dies, becomes legally incapable of exercising the power, or releases the power, the power may be exercised by the others, unless the creating instrument explicitly forbids.

**AUTHOR'S NOTE:** This embodies the rule first stated in MINN. 1943, § 502.67. It was also adopted in N.Y. 1964, § 166; E.P.T.L. § 10-6.7; WIS. 1965, § 232.05(4); and in MICH. 1967, § 5(5).

8. None of the provisions in the subsections of this section shall be construed in any way to modify the power of a court of competent jurisdiction to remedy a defective exercise of an imperative power of appointment.

**AUTHOR'S NOTE:** This is a precautionary provision suggested by the first sentence in N.Y. 1964, § 148, which is retained in E.P.T.L. § 10-6.2. The writer believes it to be a desirable provision. Perhaps it should be broadened by omitting the word "imperative." With that omission it would be closer to the rule of the common law as expressed in RESTATEMENT § 347.

*Section 16. Exercise of a power; instrument executed before the power was created.*

A power existing at the donee's death, but created after the execution of his will is effectively exercised thereby if the will is an otherwise effective appointment, unless

(a) the donor manifests an intent that the power may not be exercised by a will previously executed, or

(b) the donee manifests an intent not to exercise a power subsequently acquired.

**AUTHOR'S NOTE:** This is accepted common law. See RESTATEMENT § 344. It is also required by the decision in *California Trust Co. v. Ott*, 59 Cal. App. 2d 715, 140 P.2d 79 (1943).

*Section 17. Exercise of a power; what constitutes.*

An effective exercise of a power of appointment by its donee requires a manifestation of the donee's intent to exercise such power. Such a manifestation exists when

(a) the donee, in a deed or will, declares, in substance, that he exercises this specific power, or all powers that he has; or

(b) the donee, sufficiently identifying property covered by the power, executes a deed or leaves a will, purporting to convey such property; or

(c) the donee includes in his will, pecuniary gifts or a residuary gift or both which, when read with reference to the property which he owned and the circumstances existing at the time of the formulation of the will, justifies a finding that the donee understood that he was disposing of the appointive assets; or

**AUTHOR'S NOTE:** The first three clauses of this section 17 are all accepted common law. See RESTATEMENT §§ 342, 343. They are also required by California decisions. See *Reed v. Hollister*, 44 Cal. App. 533, 186 P. 819 (1919); *Childs v. Gross*, 41 Cal. App. 2d 680, 107 P.2d 424 (1940). These rules are embodied in N.Y. 1964, § 147(1)(2) and (3); E.P.T.L. § 10-6.1 (1)(2) and (3); WIS. 1965, § 232.03(2); and MICH. 1967, § 4.

(d) the donee has a general power exercisable by will, with no gift in default in the creating instrument and with no requirement in the instrument creating the power that the donee make a specific reference to the power as required in Section 15(5) of this chapter, and the donee includes in his will a residuary clause, or other general language purporting to dispose of all the donee's property of the kind covered by the power, and no interest is manifested, either expressly or by necessary inference, not to exercise the power.

**AUTHOR'S NOTE:** This fourth clause is the proposed substitute for CAL. PROB. CODE § 125. It embodies the rule of WIS. 1965, § 232.03(2). See text of this article accompanying notes 65-70 *supra*. The complete reversal of the rule stated in CAL. PROB. CODE § 125, involving a return to the common law rule, would be accomplished by the complete omission of clause (d). Intermediate positions would omit the words "with no gift in default in the creating instrument," as is done in MICH. 1967, § 4, or by omitting both the above quoted phrases and also the word "general," as is done in N.Y. 1964, § 147(4). If it is decided generally to retain the rule of CAL. PROB. CODE § 125, unchanged, clause (d) will require redrafting, with or without the reference to section 15(5) of this statute. This

writer recommends the substantial return to the common law rule, which is accomplished by the submitted wording of this clause (d).

*Section 18. Exercise of a power; two or more permissible appointees.*

The donee of any special power of appointment may appoint the whole or any part of the appointive assets to any one or more of the permissible appointees and exclude others; except to the extent that the donor specifies either a minimum share or amount, or a maximum share or amount, to be appointed to one or more of the permissible appointees, in which cases the exercise of the power must conform to such specifications.

**AUTHOR'S NOTE:** This section embodies the common law constructional preference for exclusive powers as embodied in RESTATEMENT § 360. It is also contrary to the erroneous finding of *Estate of Sloan*, 7 Cal. App. 2d 319, 46 P.2d 1007 (1935), as to what was the common law rule. It is phrased like WIS. 1965, § 232.07 and is more exact in its coverage than either N.Y. 1964, § 151 or MICH. 1967, § 7, although the modern preference for exclusive powers is expressed in both of the statutes.

*Section 19. Exercise of a power; permissible types of appointment under a general power.*

The donee of a general power of appointment can effectively

- (a) appoint at one time or make several partial appointments at different times, where the power is exercisable inter vivos;
- (b) appoint present or future interests or both;
- (c) make appointments subject to conditions or charges;
- (d) make appointments subject to otherwise lawful restraints on the alienation of the appointed interest;
- (e) make appointments in trust;
- (f) make an appointment by creating a new power of appointment.

**AUTHOR'S NOTE:** This section embodies the rules of the common law as found in RESTATEMENT §§ 356-57. No comparable section is found in the statutes of the other states, namely N.Y. 1964, WIS. 1965, and MICH. 1967. The section merely makes it clear that, under a general power to appoint, the donee has exactly the same freedom of disposition as he has with respect to his own assets.

*Section 20. Exercise of a power; permissible types of appointment under a special power.*

The donee of a special power of appointment can effectively make any one or more of the types of appointment permissible for the donee of a general power, under the rule stated in the next preceding section, provided only that the persons benefited by any such appointment are exclusively persons who are permissible appointees under the terms of the special power.

**AUTHOR'S NOTE:** This section embodies the rules of the common law as found in RESTATEMENT §§ 358-59, *except* that it authorizes the donee of a special power to exercise the power by creating a general power of appointment in a permissible object. Since the donee is empowered to appoint outright to one of the permissible objects of the special power, it is irrational to refuse to allow him to give such a person a general power to appoint. In so far as the RESTATEMENT § 359(3) hesitated to take this position, its irrationality is corrected in this section for California. See 3 R. POWELL, REAL PROPERTY ¶ 398 n.76 (1967).

*Section 21. Exercise of a power; fraud on special power.*

If the donee of a special power exercises his power in favor of a permissible object, but, directly or indirectly, such appointment was intended to benefit a nonobject, to any extent, the exercise of the power is ineffective.

**AUTHOR'S NOTE:** This section is a corollary of the rule stated in section 20. It is an aspect of the common law which was treated at length in RESTATEMENT §§ 352-55. Attempts by a donee of a special power to frustrate the desire of the donor that the appointive assets shall be devoted exclusively to the class of objects designated, or else pass to the takers in default, deserves protection. The decision in *Horne v. Title Ins. & Trust Co.*, 79 F. Supp. 91 (S.D. Cal. 1948), requires recognition of this rule in this statute. The leading case on the topic is *Matter of Carroll*, 153 Misc. 649, 275 N.Y.S. 911 (Sur. Ct. 1934), *modified*, 247 App. Div. 11, 286 N.Y.S. 307 (Sup. Ct. 1936), *rev'd*, 274 N.Y. 288, 8 N.E.2d 864 (1937).

*Section 22. Exercise of a power; void as to excess only.*

An exercise of a power of appointment is not void solely because it was more extensive than was authorized by the power. Interests created by such an exercise are valid, so far as is permitted by the terms of the power.

**AUTHOR'S NOTE:** This section embodies the desirable salvaging rule of N.Y. 1964, § 152 and E.P.T.L. § 10-6.6(1). No comparable rule is found in the RESTATEMENT or in WIS. 1965 or MICH. 1967.

*Section 23. Exercise of a power; lapse.*

If an attempted exercise of a power is ineffective because of the death of an appointee prior to the effective date of the exercise, the appointment is to be effectuated, if possible, by applying the provisions of Probate Code section 92, as though the appointive assets were property of the appointor, except that the statute shall in no case pass property to a nonobject of a special power.

**AUTHOR'S NOTE:** This section embodies the ideas of the RESTATEMENT §§ 349-50, *broadened* to cover special powers, by employing the language of MICH. 1967, § 20. It is recommended that the subject of lapse be dealt with in this statute in the broadened form proposed.

*Section 24. Rule against perpetuities; time at which permissible period begins.*

The permissible period under the applicable rule against perpetuities begins

(a) in the case of an instrument exercising a general power of appointment presently exercisable on the effective date of the instrument of exercise; and

(b) in all other situations, at the time of the creation of the power. The rule of this clause applies to the exercise of a general testamentary power.

**AUTHOR'S NOTE:** This section embodies the common law rule as stated in RESTATEMENT §§ 391-92. It is substantially identical with N.Y. 1964, § 154; E.P.T.L. § 10-8.1(a); and MICH. 1967, § 14. As to general testamentary powers, it follows the widely accepted American rule, as distinguished from the English rule, recently accepted in the Rhode Island decision of *Industrial Nat'l Bank v. Barrett*, — R.I. —, 220 A.2d 517 (1966). See also collection of cases in 5 R. POWELL, REAL PROPERTY ¶ 788 (1962).

The rule concerning the time at which the permissible period begins to run when the creator of a trust has reserved an unqualified power to revoke (N.Y. 1964, § 155) is omitted because it is outside the field of powers of appointment.

#### *Section 25. Rule against perpetuities; facts to be considered.*

When the permissible period under the applicable rule against perpetuities begins at the time of the creation of a power of appointment with respect to interests sought to be created by an exercise of the power, facts and circumstances existing at the effective date of the instrument exercising the power shall be taken into account in determining the validity of interests created by the instrument exercising the power.

**AUTHOR'S NOTE:** This is an accepted rule of the common law. See RESTATEMENT § 392(a). The rule began with *Minot v. Paine*, 230 Mass. 514, 120 N.E. 167 (1918), and has gained acceptance in many common law states, including Delaware, Georgia, Kentucky, Missouri, New Jersey and Pennsylvania. The section is substantially identical with N.Y. 1964, § 157; E.P.T.L. § 10-8.3; and MICH. 1967, § 17. It is also the rule heretofore applied in California. See *Estate of Bird*, 225 Cal. App. 2d 196, 37 Cal. Rptr. 288 (1964).

#### *Section 26. Imperative power; effectuation.*

Where an imperative power of appointment

(a) confers on its donee a right of selection, and the donee dies without having exercised the power, its exercise must be adjudged for the benefit equally of all the persons designated as permissible appointees;

(b) has been exercised defectively, either wholly or in part by the donee, its proper execution may be adjudged in favor of the person or persons purportedly benefited by the defective exercise;

(c) has been so created as to confer on a person the right to compel the exercise of the power in his favor, its proper exercise may be adjudged in favor of such person, his assigns, his creditors and the committee of his person.

**AUTHOR'S NOTE:** This section undertakes to encompass the general consequences flowing from the imperative (or trust) character of the power. It is modeled on N.Y. 1964, § 153 and it is materially less complex than E.P.T.L. § 10-6.8. It is, nevertheless, believed to be adequate for the purposes of this statute.

*Section 27. Appointment to a trustee on a trust which fails; capture.*

When the donee of a general power of appointment appoints to a trustee upon a trust which fails, there is a resulting trust in favor of the donee or of his estate, unless either the donor or the donee manifests an inconsistent intent.

**AUTHOR'S NOTE:** This section embodies the common law rule of "capture." See RESTATEMENT § 365(2). The authorities supporting this rule from England, Illinois and Massachusetts are collected in 3 R. POWELL, REAL PROPERTY ¶ 400 n.35 (1967). There are no holdings on this problem outside of the three jurisdictions named. No mention of the problem is found in the recent statutes of Michigan, New York and Wisconsin.

*Section 28. Appointment assuming control of the appointive assets for all purposes; capture.*

When the donee of a general power of appointment makes an ineffective appointment not within the rule of section 27, but which manifests the intent of the donee to assume control of the affected appointive assets, for all purposes and not only for the limited purpose of giving effect to the expressed appointment, there is a resulting trust in favor of the donee or of his estate, unless the donor manifests a contrary intent.

**AUTHOR'S NOTE:** This section involves the second branch of the common law rule of "capture." See RESTATEMENT § 365(3). The authorities supporting this rule from England, Illinois, Maryland and Massachusetts are collected in 3 R. POWELL, REAL PROPERTY ¶ 400 nn.36-39 (1967). There are no holdings on this problem outside of the four jurisdictions named. No mention of the problem is found in the recent statutes of Michigan, New York and Wisconsin.

*Section 29. Ineffective appointment; effect of.*

Where the donee of a discretionary power of appointment releases the entire power, or, ineffectively makes an appointment which is not within the rules of Section 27 or Section 28, the appointive assets pass to the person or persons, if any, named by the donor as takers in default, and if there are none such, revert to the donor.

**AUTHOR'S NOTE:** This is accepted common law. See RESTATEMENT § 365(1). It is also the rule adopted in California by Estate of Baird, 120 Cal. App. 2d 219, 260 P.2d 1052 (1953); 135 Cal. App. 2d 333, 287 P.2d



365 (1955), with the desirable result of minimizing the expenditure for taxes, fiduciary fees and lawyer's fees by the estate of the donee.

*Section 30. Irrevocability; creation, exercise or release of a power.*

The creation, exercise or release of a power of appointment is irrevocable unless the power to revoke is reserved in the instrument creating, exercising or releasing the power.

AUTHOR'S NOTE: This section is substantially identical with N.Y. 1964, § 144 and E.P.T.L. § 10-9.1. It is worded exactly the same as MICH. 1967, § 9 and is very similar to WIS. 1965, § 232.11. It embodies the common law as stated in RESTATEMENT § 366.

*Section 31. Applicable law.*

To whatever extent the law existing at the time of the creation of a power and the law existing at the time of the release or exercise of a power or at the time of the assertion of a right embodied in a provision of this chapter shall differ, the law of the State of California existing at the time of such release, exercise or assertion of a right shall control.

AUTHOR'S NOTE: This section keeps the law of powers abreast of current statutes not only as to powers but also as to the Rule Against Perpetuities, the rule as to accumulations and the rule as to lapse. It performs the same functions as are partially performed by N.Y. 1964, §§ 156, 158; E.P.T.L. §§ 10-8.2, 10-8.4; WIS. 1965, § 232.21; and MICH. 1967, § 22.

*Section 32. Constitutionality; severability clause.*

AUTHOR'S NOTE: A severability clause is always desirable. It is not presented here in draft form, as its form should be identical with that heretofore used by the Law Revision Commission.